

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)

SACRED WIND COMMUNICATIONS, INC.)
and)
QWEST CORPORATION)

Joint Petition for Waiver of the Definition of)
"Study Area" Contained in Part 36, Appendix-)
Glossary of the Commission's Rules)

SACRED WIND COMMUNICATIONS, INC.)

Related Waivers of Parts 36, 54 and 69 of the)
Commission's Rules)

Docket No. _____

ORIGINAL

JOINT PETITION FOR EXPEDITED WAIVER

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SUMMARY

In this Joint Petition for Expedited Waiver ("Petition"), Sacred Wind Communications, Inc. ("Sacred Wind") and Qwest Corporation ("Qwest"), jointly request an expedited waiver of the definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's rules to effectuate Qwest's sale to Sacred Wind of approximately 2,300 copper lines on and near the Navajo Reservation in the State of New Mexico.¹ In addition, Sacred Wind separately seeks related waivers on an expedited basis of Parts 36, 54 and 69 of the Commission's rules. The Petition presents the Commission with a critical opportunity to further its goal of promoting telecommunications deployment and subscribership in unserved and underserved areas on tribal lands.

Sacred Wind was established in 2004 to provide advanced and basic telecommunications services to the Navajo people on Reservation and near-Reservation lands, initially in the State of New Mexico. On March 21, 2006, the company was granted a Certificate of Public Convenience and Necessity to operate as an Incumbent Local Exchange Carrier ("ILEC") by the New Mexico Public Regulation Commission ("NMPRC") and was designated an eligible telecommunications carrier ("ETC") pursuant to Section 214(e)(2) of the Communications Act of 1934, as amended, and Section 54.201 of the Commission's rules.

Sacred Wind is committed to increasing significantly the quality of basic and advanced services provided to the Navajo Nation and the penetration rate in its service area, and ensuring that such services are provided at affordable rates. At present, more than 50 percent of the households in Sacred Wind's service area are at or below the poverty level. The penetration rate in Sacred Wind's territory is among the lowest in the country at 28 percent, well-below the 38

¹ Qwest only joins in Part III of this Petition.

percent penetration rate for the Navajo Nation as a whole. Indeed, some areas to be served by Sacred Wind have no telephone service at all.

Sacred Wind plans to use the existing copper wire infrastructure purchased from Qwest to serve and upgrade service to existing customers, and expand service to new customers by deploying a new Fixed Wireless Local Loop ("FWLL") Network on an IP platform. Included in this build-out will be an entirely new fixed wireless backbone and state-of-the-art IP switching facilities that will allow Sacred Wind to efficiently bring basic and advanced services comparable to that found in urban areas to the Navajo people at affordable rates, and significantly increase penetration in its service area.

Despite the efficiencies inherent in Sacred Wind's FWLL architecture, the significant costs of network buildout combined with the limited ability of Sacred Wind's customers to pay for services, make universal service fund ("USF") high-cost support essential to building a locally-owned and operated telecommunications network to serve the Navajo people. Moreover, the waivers requested are critical to Sacred Wind obtaining the full level of support necessary for its buildout in a timely manner.

Specifically, Sacred Wind and Qwest jointly seek a waiver of the definition of "study area" to permit Sacred Wind to establish a new study area consistent with its service territory. In addition, Sacred Wind seeks a finding that Section 54.305 of the Commission's rules – which provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same levels of high-cost support for which the exchanges were eligible prior to transfer – does not apply to the instant transaction because Sacred Wind is not purchasing an "exchange." In the alternative, Sacred Wind seeks a waiver of Section 54.305 to permit Sacred Wind to obtain high-cost funding based upon the average cost of the acquired lines, essential interim switching

facilities and Operating Support Systems (“OSS”) acquired from Qwest, and ultimately the cost of the network it is constructing, rather than the per-line level of support for which the acquired lines were eligible prior to the transfer.

In addition, Sacred Wind seeks a waiver of Sections 36.611 and 36.612 of the Commission’s historical cost rules to allow Sacred Wind immediately to begin receiving high-cost loop support based upon Sacred Wind’s current costs for an interim period. Sacred Wind also seeks a waiver of Sections 54.301(b) and 54.903(a)(3) of the Commission’s rules to allow Sacred Wind immediately to be eligible to receive local switching support (“LSS”) and interstate common line support (“ICLS”).

Sacred Wind requests certain waivers of the Commission’s timing and certification requirements to avoid any unnecessary and unwarranted delays in the receipt of this critical universal service funding. Absent these waivers, Sacred Wind would be denied universal service support for up to two years – a result that would seriously harm Sacred Wind’s ability to build out its network and provide service to the Navajo people. These waivers will allow Sacred Wind to recoup immediately the substantial investments made during its initial years of operation, and thus enable it to extend reasonably-priced telecommunications services to residential customers in low-income, rural and high-cost Navajo lands.

In addition, Sacred Wind seeks a waiver of the Commission’s stay on the availability of Enhanced Lifeline and Link Up for rural telecommunications customers on near-Reservation lands. The Commission has made clear that, in certain circumstances, strict application of the Commission’s stay on the availability of this federal support may frustrate the public interest and the Commission’s goal of increasing telephone penetration rates in unserved and underserved

areas.² Such is undoubtedly the case here. The record clearly demonstrates that the near-Reservation lands to be served by Sacred Wind have the same impediments to subscribership as the adjacent Reservation lands, and thus special circumstances exist to justify a waiver of the Commission's stay.

Finally, Sacred Wind requests that the Commission grant such other waivers on its own motion as are necessary to expedite Sacred Wind's receipt of USF support.

The requested waivers in this Petition serve the public interest and are consistent with the Commission's efforts "to secure for consumers living on tribal lands the same opportunities to take advantage of telecommunications capabilities that other Americans have."³ They should be granted expeditiously.

² See generally *In the Matter of Federal-State Joint Board on Universal Service*, Smith Bagley, Inc., Memorandum Opinion and Order, 20 FCC Rcd 7701, ¶¶ 8-15 (2005) ("*Smith Bagley*").

³ *Extending Wireless Telecommunications Services to Tribal Lands*, Notice of Proposed Rulemaking, 14 FCC Rcd 13679, ¶ 1 (1999).

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JOINT PETITION FOR EXPEDITED WAIVER

Sacred Wind Communications, Inc. ("Sacred Wind"), a New Mexico corporation, and Qwest Corporation ("Qwest") hereby request, pursuant to Section 1.3 of the Commission's rules, a waiver of the definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's rules to effectuate Qwest's sale to Sacred Wind of certain telecommunications assets serving the Navajo Nation. In addition, Sacred Wind seeks related waivers of Parts 36, 54 and 69 of the Commission's rules.

I. INTRODUCTION AND BACKGROUND.

Sacred Wind was established in 2004 to provide much-needed telecommunications services to the Navajo people. On March 21, 2006, Sacred Wind was issued a Certificate of Public Convenience and Necessity by the New Mexico Public Regulation Commission ("NMPRC") to operate as an ILEC for the provision of local telecommunications services in

New Mexico.⁴ In that Order, the NMPRC designated Sacred Wind an eligible telecommunications carrier (“ETC”) pursuant to Section 214(e)(2) of the Telecommunications Act of 1996⁵ and Section 54.201 of the Commission’s rules.⁶

The area within which Sacred Wind is authorized to provide telecommunications service is located almost exclusively within Navajo Nation lands.⁷ Sacred Wind’s certificated service area covers approximately 2,000,000 acres of both Reservation and near-Reservation lands, almost all of which are historical tribal lands of the Navajo people. Further, Sacred Wind’s certificated service area wholly includes seven Chapters of the Navajo Nation and portions of an additional twenty-two Chapters.⁸

The Commission has recognized that Native American communities “on average, have the lowest reported telephone subscribership level in the country.”⁹ Telephone penetration in Sacred Wind’s service territory is only 28 percent, substantially below both the 38 percent penetration for the Navajo Nation as a whole, and a fraction of the 97.6 percent nationwide rate. Adding more context, a recent study found that the Navajo Nation’s subscribership was the lowest – 17 points lower than the next lowest – among the 25 tribal lands with the most Native

⁴ See *Matter of the Application of Sacred Wind Communications, Inc. for Certificates of Financial and Technical Competency, Operating Authority, Public Convenience and Necessity and for Designation as an Eligible Telecommunications Carrier and Approval of Initial Tariffs*, Amended Recommended Decision, N.M. Public Regulation Commission, Case No. 05-00272-UT, Mar. 9, 2006 at 51, *adopted by*, Final Order, Mar. 21, 2006 (“Adopted Recommended Decision” and “NMPRC Final Order,” respectively), attached hereto as Exhibit 1.

⁵ Public Law No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

⁶ See NMPRC Final Order at 51.

⁷ Maps depicting Sacred Wind’s certificated service area are attached hereto as Exhibit 2.

⁸ A Chapter is a local governing structure within the Navajo Nation. Chapters were recognized as a governing entity by the Navajo Nation Legislature with the passage of the Local Governance Act, April 20, 1998. Currently, there are a total of 110 Chapters officially recognized by the Navajo Nation.

⁹ *Federal-State Joint Board on Universal Service*, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208, ¶ 5 (2000) (“*Twelfth Report and Order*”).

American households.¹⁰ Eighteen of these 25 areas had rates above 75 percent.¹¹ Most recently, the Commission reported a 52.5 percent penetration rate for all Native American households within the state of New Mexico, the second lowest in the nation.¹² Some areas to be served by Sacred Wind have no telephone service at all. More than 50 percent of the population in the proposed service area has income levels at or below the poverty level.

Sacred Wind is dedicated to providing critical services to these underserved and unserved areas, deploying a new network that will provide both basic and advanced telecommunications services to the residents of the Navajo Nation. To this end, Sacred Wind has entered into an Asset Purchase Agreement (“APA”) with Qwest, pursuant to which Qwest has agreed to sell to Sacred Wind approximately 2,300 copper lines.¹³ Sacred Wind plans to use this existing copper wire infrastructure purchased from Qwest to serve and upgrade service to existing customers and expand service by deploying a new Fixed Wireless Local Loop (“FWLL”) network on an IP-platform, over which Sacred Wind will provide both basic and advanced telecommunications services to remote areas on and off the Navajo Reservation. Included in this new build-out will be an entirely new fixed wireless backbone and state-of-the-art IP switching facilities. Sacred Wind’s network will provide the Navajo Nation with unprecedented access to services and technologies necessary to end the economic isolation that plagues this region. In addition to providing services directly to Navajo residences and businesses, Sacred Wind is also establishing a number of Internet hubs in communal locales frequented by the Navajo people. These local

¹⁰ U.S. Government Accountability Office, *Challenges to Assessing and Improving Telecommunications for Native Americans on Tribal Lands* 14 (2006) (“GAO Tribal Lands Report”).

¹¹ *Id.*

¹² *Trends in Telephone Service*, Table 16.3, Federal Communications Commission (rel. June 21, 2005).

¹³ In the APA, Qwest has agreed to sell Sacred Wind the copper and any fiber distribution, extensions and drops, Network Interface Devices (“NIDs”), any inside wire of homeowners who have subscribed to a Qwest Linebacker service, poles, conduit, pedestals, cross boxes, and splice boxes. No switching or central office facilities are included in the transaction.

learning centers will provide the Navajo with access to state-of-the-art telecommunications facilities and related educational materials critical to the advancement of this economically depressed region.

The receipt of support from the USF is important to any carrier desiring to provide universal service to high cost areas. Despite the efficiencies inherent in Sacred Wind's FWLL architecture, the significant costs of network buildout combined with the limited ability of Sacred Wind's customers to pay for services, make universal service support essential.¹⁴ As the Commission has recognized, providing much-needed telecommunications services and increasing penetration in underserved and unserved areas such as this is the *raison d'être* of the USF program:

[B]y enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase their access to education, commerce, government, and public services. Furthermore, by helping to bridge the physical distance between low-income consumers on tribal lands and the emergency, medical, employment and other services that they may need, our actions ensure a standard of livability for tribal communities.¹⁵

In furtherance of the public interest goals set forth in the 1996 Act and the Commission's rules, and to more efficiently serve its rural customers, Sacred Wind seeks the waivers requested herein, which are essential to its obtaining the full level of support necessary for its buildout in a timely manner.¹⁶ *First*, Sacred Wind and Qwest jointly request a waiver of the Commission's

¹⁴ The *GAO Tribal Lands Report* identified four impediments to improving telecommunications on tribal lands: (i) the rural, rugged terrain of tribal lands; (ii) limited financial resources; (iii) a shortage of technically trained tribal members; and (iv) difficulty in obtaining rights-of-way. The GAO noted that "the rural location of tribal lands (which increases the cost of installing telecommunications infrastructure) and tribes' limited financial resources (which can make it difficult for residents and tribal governments to pay for services) can combine to deter service providers from making investments in telecommunications on tribal lands. This lack of investment can result in a lack of service, poor service quality, and little or no competition." *GAO Tribal Lands Report* at 35.

¹⁵ *Twelfth Report and Order* at ¶ 5.

¹⁶ Sacred Wind also has applied for a \$70.8 million loan from the RUS to cover some of the capital investments necessary for the provision of adequate and reliable local exchange service, including: (1) the construction of a

study area freeze to allow Qwest to remove the subject territory from its New Mexico study area and to permit Sacred Wind to establish a new cost-based study area corresponding to its service territory. *Second*, Sacred Wind seeks a finding that Section 54.305 of the Commission's rules does not apply in the instant case because Sacred Wind is not purchasing an "exchange."¹⁷ This would allow Sacred Wind to receive high-cost support based upon the average cost of the acquired lines, rather than the per-line level of support for which the acquired lines were eligible prior to the transfer. In the alternative, Sacred Wind seeks a waiver of Section 54.305. *Third*, Sacred Wind requests a waiver to allow it to immediately begin receiving high-cost universal service support based upon current costs, rather than historical costs, which would delay receipt of universal service funding by up to two years and seriously harm Sacred Wind's ability to provide affordable, high-quality telecommunications services to the Navajo people. *Fourth*, Sacred Wind seeks additional waivers to allow it to become a member of the National Exchange Carrier Association ("NECA") and immediately participate in NECA pools and tariffs. *Fifth*, Sacred Wind asks the Commission to lift its stay on the availability of Enhanced Lifeline and Link Up for its customers on near-Reservation lands. Sacred Wind also requests expedited treatment of this Petition.

Specifically, Sacred Wind seeks the following waivers of the Commission's rules:

- (1) Jointly with Qwest, a waiver of the definition of "study area" contained in the Appendix-Glossary of Part 36 of the Commission's rules;

central office with TDM/IP electronic switching, (2) the construction of a more "distance friendly" fixed wireless local loop network, (3) the installation of backup power supplies at tower locations, and (4) the addition of digital carrier equipment for DSL services to current wireline customers. Sacred Wind recently received notice that the RUS has approved its loan design and the full amount. Sacred Wind expects final approval of the RUS loan to come in the next few weeks.

¹⁷ Section 54.305 only applies to the "sale or transfer of exchanges." 47 C.F.R. § 54.305. During the period that Sacred Wind's network is under construction, Sacred Wind will purchase switching and Operating Support Systems ("OSS") support from Qwest. These services will be provided by Qwest facilities that currently serve the access lines being acquired by Sacred Wind.

(2) A finding that Section 54.305 of the Commission's rules does not apply to this transaction, or in the alternative, a waiver of that section;

(3) Waiver of Sections 36.611 and 36.612 of the Commission's historical cost rules to allow Sacred Wind immediate access to high-cost loop support based on Sacred Wind's current data for an interim period;

(4) Waiver of Sections 54.301(b) and 54.903(a)(3) of the Commission's rules to allow Sacred Wind immediately to be eligible to receive local switching support ("LSS") and interstate common line support ("ICLS");

(5) Waiver of the October 1 and/or January 1 state USF certification deadlines set forth in Section 54.314(d) of the Commission's rules;

(6) Waiver of the definition of "telephone company" in Section 69.2(hh), to the extent necessary,¹⁸ the annual election filing deadline in Section 69.3(e)(6) to allow Sacred Wind to become a member of NECA and immediately participate in NECA pools and tariffs, and of Section 69.3(e)(11) to allow Sacred Wind to utilize NECA as its tariff pool administrator; and

(7) Waiver of the Commission's stay on the availability of Enhanced Lifeline and Link Up for customers on near-Reservation lands.

Granting these waivers will ensure the achievement of the Commission's goal of universal service by assisting local exchange carriers ("LECs") serving high-cost rural areas and

¹⁸ To the extent that a company has not been considered a successor or assign, either because it was considered a new company or presumably because it did not purchase an exchange from an ILEC, the Commission has required a waiver of the definition of "telephone company" in order for the company to become a member of NECA. See, e.g., *Matter of M&L Enterprises, Inc., d/b/a Skyline Telephone Co., Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*, Order, 19 FCC Rcd 6761, 6770-72 (2004) ("Skyline P"); *Matter of Adak Eagle Enterprises, LLC, d/b/a Adak Telephone Utility, Petition for Waiver of Sections 36.611, 36.612, 54.301(b), 54.314(d), 54.903(a)(3), 69.2(hh) and 69.3(e)(6) of the Commission's Rules*, Order, CC Docket 96-46, DA 053352, ¶ 14 (2005) ("Adak"); *Matter of Allband Communications Cooperative, Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, Order, WC Docket No. 05-174, DA 05-2268, ¶ 6 (2005) ("Allband"); *Matter of Direct Communications Cedar Valley, LLC and Qwest Corp., Joint Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules, Petition for Waiver of Sections 69.2(hh) and 69.605(c) of the Commission's Rules*, Order, CC Docket No. 96-45, DA 05-3105, ¶¶ 13-15 (2005).

*maintaining affordable local service rates. As Congress mandated in the 1996 Act, “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular and high-cost areas, should have access to telecommunications and information services . . . at rates that are reasonably comparable to rates charged for similar services in urban areas.”*¹⁹ Given the low penetration rate and impoverished conditions in the territory to be served by Sacred Wind, it is hard to imagine a more compelling case for waiving the Commission’s rules and promoting the public interest in the goal of universal service.

In the event any additional waivers are necessary to expedite Sacred Wind’s receipt of USF support and participation in NECA pools and tariffs, Sacred Wind requests that such waivers be considered and granted on the Commission’s own motion. Moreover if some of the waivers requested herein will require substantially more time for review than others, Sacred Wind respectfully requests that those waiver requests be severed and those requiring less time be granted while review of the other requests is pending.

II. STANDARD FOR WAIVER.

Under Section 1.3 of the Commission Rules, “any provision of the Commission’s rules may be waived by the Commission . . . or on petition if good cause therefore is shown.”²⁰ The Commission has read this rule to permit waivers where “particular facts would make strict compliance inconsistent with the public interest.”²¹ As interpreted by the courts, this requires a petitioner to demonstrate that “special circumstances warrant a deviation from the general rule

¹⁹ 47 U.S.C. § 254(b)(3).

²⁰ 47 C.F.R. § 1.3.

²¹ *Matter of Policies and Roles Concerning Operator Services Access and Pay Telephone Compensation*, 7 FCC Rcd 4355, 4364 n.118 (1992).

and that such a deviation will serve the public interest.”²² As demonstrated below, the special circumstances of this case warrant a waiver of the Commission’s rules.

Sacred Wind’s request for waivers serves the public interest and is consistent with the Commission’s recent efforts “to secure for consumers living on tribal lands the same opportunities to take advantage of telecommunications capabilities that other Americans have.”²³

The Commission recognizes that:

As our society increasingly relies on telecommunications technology for employment and access to public services, such telecommunications services have become a practical necessity. The absence of telecommunications services within a home places its occupants at a disadvantage when seeking to contact, or be contracted by, employers and potential employers. The inability to contact police, fire departments, and medical service providers in an emergency situation may have, and in some areas routinely does have, life-threatening consequences. In geographically remote areas, access to telecommunications services also may provide a source of access to more advanced services.²⁴

The situation here is no different. Among the primary obstacles that incumbent carriers face in providing service on the Reservation has been the sheer expanse of land, relative population density, difficulties in obtaining required rights-of-way for initial construction and maintenance of existing facilities. Accordingly, as discussed above, the telecommunications services currently provided to the Navajo people do not meet the needs of the Tribe and its members, and do not reflect the kind of high-quality basic and advanced services available in other areas. The current facilities lack capacity for growth and are unsuitable for high speed services. Moreover, telecommunications services are available only in the higher density

²² *ALLTEL Corporation Petition for Waiver of Section 61.41 of the Commission's Rules and Applications for Transfer of Control*, Memorandum Opinion and Order, 14 FCC Rcd 14191, 14201 (1999) (quoting *Northwest Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990)) (“ALLTEL”). See also *Wait Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir 1969).

²³ *Extending Wireless Telecommunications Services to Tribal Lands*, Notice of Proposed Rulemaking, 14 FCC Rcd 13679, ¶ 1 (1999) (“Tribal Wireless NPRM”).

²⁴ *Twelfth Report and Order* at ¶ 3.

subscriber regions of the Navajo Nation. *Given the impoverished conditions that have come to* typify Reservation and near-Reservation lands, many Navajo tribal members, therefore, currently have no access to even basic telecommunications services, let alone advanced services. Sacred Wind's FWLL system, combined with the unique right-of-way agreement it has negotiated with the Navajo Tribe, will allow for efficient network buildout, while minimizing disruption to the land and helping to preserve the Navajo landscape.

Sacred Wind plans to upgrade significantly the telecommunications facilities and services provided to the Navajo people. Using state-of-the-art facilities and technologies, Sacred Wind will provide affordable services that will rival services offered in any metropolitan area. The Commission's grant of the requested waivers will allow Sacred Wind to provide vastly improved telecommunications services to unserved and underserved residents in remote areas, while maintaining reasonable rates. Indeed, Sacred Wind seeks to increase penetration rates from the current level of 28 percent to 90 percent.

The Commission's responsibilities under the Federal Trust Doctrine further support the grant of the requested waivers. As a result of the unique government-to-government relationship between the Navajo Nation and the Federal Government, the United States and its agencies have a fiduciary duty to protect the interest of the various Native American tribes and their peoples.²⁵ This principle "must apply with equal force in the area of telecommunications."²⁶ Recently, the Commission explicitly recognized its trust responsibility and the rights of tribal governments to

²⁵ See, e.g., *United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935) (governmental power to manage and control Indian property and affairs is not absolute, but is subject to the limitations inherent in a guardianship).

²⁶ *Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 4078, at § 38 (rel. Sept. 3, 2000) ("*Tribal Lands FNPRM*").

"set their own communications priorities and goals for the welfare of their membership."²⁷ Of particular relevance to the instant case is the Commission's goal to ensure, "consistent with Section 1 of the Communications Act of 1934, that Indian Tribes have adequate access to telecommunications service."²⁸ Accordingly, grant of the requested waivers would be consistent with Congress' and the Commission's universal service goals, and in particular, the Commission's public interest and a trust duty to aid solutions to the problems identified herein.

III. THE COMMISSION SHOULD WAIVE ITS STUDY AREA FREEZE.

Sacred Wind and Qwest jointly seek a waiver of the Commission's "study area freeze."²⁹ Part 36 of the Commission's rules "freezes" the definition of "study area" to the boundaries that existed on November 15, 1984.³⁰ In so doing, the Commission hoped to "ensure that LECs [would] not set up high cost exchanges within their existing territories as separate study areas to maximize high cost support."³¹ The Commission did not intend, however, to discourage carriers from acquiring high-cost facilities or expanding their current services to include high-cost areas.³² In fact, the former Common Carrier Bureau has held that changes in study areas that result from arms-length purchases or sales of exchanges do not raise the concern that LECs will

²⁷ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207, at 4 (rel. June 23, 2000).

²⁸ *Id.*

²⁹ As noted above, Qwest joins only in this request for a study area waiver.

³⁰ 47 C.F.R. § Appendix-Glossary.

³¹ *Matter of US West Communications, Inc. and Eagle Telecommunications, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules and Eagle Telecommunications, Inc. Petition for Waiver of Section 61.41(c) of the Commission's Rules*, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1773 ¶ 10 (1995) (citing *MTS and WATS Market Structure, Amendment of Part 67 of the Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, 50 Fed. Reg. 939 (Jan. 8, 1985)) ("US WEST/Eagle Order").

³² *Matter of MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325, 48337 ¶ 65 (Dec. 12, 1984).

establish study area boundaries in a manner solely to maximize high-cost support received from the USF.³³

The Commission has previously determined that study area waivers will be granted when: (1) the change in study area boundaries will not adversely affect the USF support program; (2) the state commission having regulatory authority does not object to the change in study area boundaries; and (3) the public interest supports grant of the waiver.³⁴ As discussed below, Sacred Wind satisfies this three-prong test. The Commission thus should grant the study area waiver and issue an order allowing Qwest to remove the subject territory from its New Mexico study area and permitting Sacred Wind to establish a new cost-based study area.

A. Waiver of the Study Area Freeze Will Not Adversely Affect the USF.

Waiver of the study area freeze will not adversely affect the USF because it will not result in an annual aggregate shift in high-cost support in an amount equal to or greater than one percent of the total annual high-cost fund.³⁵ Based on the Universal Service Administrative Company's ("USAC's") first quarter 2006 projections (\$948,701,000), the total annual high-cost support for the nation will be approximately \$3.795 billion (\$948,701,000 x 4). One percent of that amount is in excess of \$37 million. Sacred Wind estimates that it will initially be eligible for approximately \$2.1 million in high-cost support in 2006, and that this eligibility will grow to approximately \$6.6 million in 2010.³⁶ Even at the projected maximum level of support, Sacred

³³ *Contel of the West* Petition for Waiver of Section 36.125(f), Sections 36.154(4)(1) and (2), and the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules, Oregon-Idaho Utilities, Inc. Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules, Memorandum Opinion and Order, 5 FCC Rcd 4570, 4571 ¶ 9 (1990).

³⁴ See *US WEST/Eagle Order*, 10 FCC Rcd 1772, at ¶ 5.

³⁵ See *id.* at ¶ 15; *Matter of M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612, and 69.2(hh) of the Commission's Rules*, Order, 19 FCC Rcd 6761, 6767, n.37 (2004) ("*Skyline P*").

³⁶ Sacred Wind will be filing separately, and seeking confidential treatment for, an exhibit containing its financial and USF projections for 2006 through 2010.

*Wind will be using only a small fraction of 1 percent of total USF support.*³⁷ Accordingly, granting the requested study area waiver would not significantly impact, or threaten unwarranted growth of, the USF.

B. The NMPRC Does Not Object to a Study Area Waiver.

The NMPRC does not object to the proposed change in study area boundaries. As the attached letter from the NMPRC to the Commission states “. . . the NMPRC does not object to the interstate study area waiver and does not prejudge the effect, if any, such waiver may have upon the intrastate operations of the affected parties.”³⁸ Accordingly, given that the NMPRC does not object to the waiver of study area boundaries, Sacred Wind has satisfied the second prong of the Commission’s three-prong test.

C. Granting this Joint Petition for a Study Area Waiver Will Serve the Public Interest.

The public interest will be served by a waiver of the study area freeze. As discussed herein, grant of the study area and related waivers will serve the public interest by ensuring improved services to the Navajo Nation, and enabling the provision of basic and advanced telecommunications services to previously unserved and underserved areas. As the Commission noted in a similar proceeding, a study area waiver is appropriate when grant of the requested waiver will enable the carrier “to provide ‘vastly improved telecommunications services without requiring significant increases in basic service rates.’”³⁹ Among other things, the Commission

³⁷ See *Skyline I* at n.37.

³⁸ See Letter from NMPRC to Thomas Navin, Chief, FCC Wireline Competition Bureau (Mar. 21, 2006), attached hereto as Exhibit 3. In the *Adopted Recommended Decision*, the NMPRC also found that it “supports the FCC’s establishment of a new study area that is the service territory of [Sacred Wind].” See *Adopted Recommended Decision* at 53.

³⁹ *Matter of Mescalero Apache Telecom, Inc., GTE Southwest Inc., and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of Study Area Contained in the Part 36, Appendix-Glossary of the Commission’s Rules, Mescalero Apache Telecom, Inc., Waiver of Sections 61.41(c)(2), 69.3(e)(11), 36.611, and 36.612 of the Commission’s Rules, Order, 16 FCC Rcd 3813, 3816, ¶ 10 (2001) (“MATI I”).*

noted that the resulting carrier, Mescalero Apache Telecom, Inc. ("MATI") intended to "extend lines to previously unserved and underserved residents in remote locations on the Mescalero Apache Reservation, without imposing line extension charges."⁴⁰

Such is the case here. Sacred Wind is committed to promoting universal service, advancing the quality of service provided to the Navajo Nation, and ensuring that its services are provided at just and reasonable rates. Like MATI, Sacred Wind will extend service to previously unserved and underserved residents in isolated regions of the Navajo Reservation. The provision of telecommunications services will improve dramatically under Sacred Wind's stewardship, and will come with reasonable and affordable basic service rates. As these factors, as well as those discussed above, demonstrate, Sacred Wind is committed to providing reliable, high-quality telecommunications service to the Navajo people. Thus, a waiver of the study area boundary freeze will serve the public interest.

IV. THE COMMISSION SHOULD EITHER FIND THAT SECTION 54.305 OF ITS RULES DOES NOT APPLY BECAUSE SACRED WIND IS NOT ACQUIRING AN EXCHANGE FROM QWEST OR, IN THE ALTERNATIVE, SHOULD WAIVE SECTION 54.305.

Section 54.305 of the Commission's rules provides that a carrier *acquiring exchanges* from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.⁴¹ As discussed more fully below, Sacred Wind requests a finding that Section 54.305 of the Commission's rules does not apply because Sacred Wind is not acquiring an "exchange" from Qwest. In the alternative, Sacred Wind requests a waiver of Section 54.305 so that it can receive high-cost

⁴⁰ MATI I at ¶ 10.

⁴¹ 47 C.F.R. § 54.305.

support based upon the average cost of the acquired lines, rather than the per-line level of support for which the acquired lines were eligible prior to the transfer.

A. Sacred Wind Is Not Acquiring an Exchange, and thus Section 54.305 of the Commission's Rules Does Not Apply.

As noted above, Section 54.305 of the Commission's rules only applies to a carrier that "acquires telephone exchanges from an unaffiliated carrier."⁴² In the *First Universal Service Report and Order*,⁴³ the Commission created Section 54.305, focusing only on transactions involving exchanges.⁴⁴ Indeed, the very section of the First Universal Service Report and Order that implements this rule is entitled "Sale of Exchanges."⁴⁵ In modifying Section 54.305 in May 2001, the Commission again speaks only of acquired or transferred *exchanges*.⁴⁶

The term "exchange" is defined in neither the 1996 Act, nor the applicable regulations. However, a leading industry reference guide defines "exchange" as:

A geographic area established by a common communications carrier for the administration and pricing of telecommunications services in a specific area that usually includes a city, town, or village. *An exchange consists of one or more central offices and their associated facilities.* An exchange is not the same as a LATA. A LATA consists of several adjacent exchanges.⁴⁷

Sacred Wind is merely acquiring 2,300 copper lines from Qwest; it is not acquiring an "exchange" per se. Fundamentally absent are the key components of a switching center, trunking, and central office facilities. Indeed, the APA between Sacred Wind and Qwest makes

⁴² *Id.*

⁴³ See *Matter of Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) ("*First Universal Service Report and Order*").

⁴⁴ *Id.* at ¶ 308.

⁴⁵ *Id.*

⁴⁶ See *Matter of Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking, 16 FCC Rcd 11244, ¶¶ 91-119 (2001) ("*Rural Task Force (RTF) Report and Order*").

⁴⁷ Harry Newton, *Newton's Telecom Dictionary*, 20th ed., CMP Books (2004) (emphasis added).

clear that the switching facilities, outside plant, and OSS – key components of an “exchange” – will continue to be owned by Qwest and be made available to Sacred Wind *for a fee* until Sacred Wind constructs its own central office and backbone, and installs and operates its own OSS. A small number of copper lines, with nothing more, is not an “exchange,” and hence the limitations on the receipt of USF support contained in Section 54.305 are not applicable to Sacred Wind.

B. To the Extent Section 54.305 of the Commission’s Rules Applies to Sacred Wind’s Transaction with Qwest, the Provision Should Be Waived.

Should the Commission find that Sacred Wind has acquired an exchange from Qwest and that Section 54.305 applies to this transaction, Sacred Wind alternatively requests a waiver of that section. A waiver would allow Sacred Wind to receive high-cost support based upon the average cost of the acquired lines, essential interim switching facilities and OSS acquired from Qwest, and ultimately the cost of the network it is constructing, rather than the per-line level of support for which the acquired lines were eligible prior to the transfer.

The policy rationale behind the adoption of Section 54.305 does not apply in the instant case. By adopting Section 54.305, the Commission sought to ensure that a selling carrier did not artificially inflate the price of an exchange in anticipation of the buyer’s (often an affiliate’s) receipt of increased universal service support as a result of the transfer.⁴⁸ No such concern is raised here. Sacred Wind is purchasing 2,300 copper lines from Qwest, at a price reflective of the condition of those lines. As Qwest received no universal service support for those lines prior to the sale, Sacred Wind could not base its decision to purchase the lines on this factor. The Commission’s concern over carriers “gaming” the USF system underlying Section 54.305 simply has no application to the instant transaction.

⁴⁸ See, e.g., *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8942-43 (1997), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part, reversed in part and remanded in part sub nom., Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

Sacred Wind is an independent entity that is not affiliated with Qwest. Sacred Wind is acquiring interim switching and OSS services from Qwest while building out its own network. As such, Sacred Wind operates entirely independently of Qwest, and thus there is no chance that either is trying to profit by spinning off high-cost areas in an effort to inappropriately increase the other's receipt of USF support.

The present situation is no different than that of *MATI*, where the Commission found that special circumstances justified granting a waiver of Section 54.305.⁴⁹ Specifically, the Commission found that the waiver was in the public interest because: (1) application of Section 54.305 "could have the unintended effect of preventing the expansion of service in unserved and remote areas of the Reservation, and the improvement of service in underserved areas;"⁵⁰ (2) *MATI* intended to address "the severe shortage of telecommunication services on the Reservation;"⁵¹ (3) the high-costs faced by *MATI*, given the then state of the facilities and extremely rugged terrain, were "unusually severe;"⁵² and (4) waiver of Section 54.305 was in the public interest because *MATI* (a) planned to improve existing services without a significant increase in basic service rates, (b) was committed to providing service to all unserved customers in the first two years of operation, and (c) would provide services comparable with those offered in any metropolitan area.⁵³ The Commission thus found that a waiver of Section 54.305 (and the corresponding increase in USF support that *MATI* would receive as a result of the waiver) was consistent with its "goal of preserving and advancing universal service," and would help "ensure

⁴⁹ *Matter of Mescalero Apache Telecom, Inc., Waiver of Section 54.305 of the Commission's Rules*, Order, 16 FCC Rcd 1312, 1316-19, ¶¶ 7-10 (2001) ("*MATI IP*").

⁵⁰ *MATI II* at ¶ 7.

⁵¹ *Id.* at ¶ 8.

⁵² *Id.* at ¶ 9.

⁵³ *Id.* at ¶ 10.

that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, have access to telecommunications and information services.”⁵⁴

Precisely the same circumstances here justify granting a waiver of Section 54.305 for Sacred Wind. Sacred Wind is a newly-formed, locally-owned and operated telecommunications company established to remedy the low penetration rates and poor telecommunications services on the Navajo Reservation and in adjacent lands. As explained above, Sacred Wind plans to upgrade the existing wireline infrastructure through deployment of an efficient FWLL network, ideally suited to bring service to the most remote regions of the Navajo Nation and overcome the right-of-way obstacles that have previously hindered deployment of robust network facilities in this area.⁵⁵ However, like MATI, the projected cost of providing such services and upgrading the facilities in Sacred Wind’s service territory “are much higher than the cost of serving other subscribers in New Mexico and higher than for most subscribers in any other state.”⁵⁶ As such, without waiver of the per-line support limit, and the resulting increase in universal service funding, Sacred Wind will be unable to upgrade the existing facilities and deploy new, high-quality facilities to support its planned build-out to underserved and unserved areas.

The particular facts, as presented by Sacred Wind, make strict compliance with Section 54.305 not only inconsistent with the public interest, but detrimental to the very goal of universal service. Failure by the Commission to waive Section 54.305 will render impossible Sacred Wind’s ability to fulfill the goal of providing high-quality, basic and advanced

⁵⁴ *Id.*

⁵⁵ Recognizing that ILECs are increasingly using fixed wireless systems in areas that are not feasible to serve via traditional copper and fiber facilities, NECA has provided guidance on the accounting and separations treatment of fixed wireless facilities used in the provision of basic exchange service, including for the development of per-loop costs for USF support. See NECA Separations Cost Issue No. 4.9, *Exchange Service Provisioned via BETRS [Basic Exchange Telephone Radio System] and BETRS-Like Radio Facilities* (rev. Nov. 2005).

⁵⁶ *MATI II* at ¶ 9.

telecommunications services to the Navajo people. Thus, waiver of Section 54.305 in this instance will increase access to telecommunications services consistent with the Commission's "statutory goal of preserving and advancing universal service," and is most certainly in the public interest.⁵⁷

C. Application of the Section 54.305 Safety Valve Mechanism to the Present Transaction Would Impede the Advancement of Universal Service on Navajo Lands and Be Contrary to the Public Interest.

The Commission, in May 2001, recognizing that Section 54.305 may have "unintended consequences,"⁵⁸ modified the rule to include a mechanism, dubbed the "safety valve," to provide support to rural carriers making post-acquisition investments in acquired exchanges.⁵⁹ Safety valve support ("SVS") provided by the rule is currently 50 percent of the difference between the high-cost loop ("HCL") support amounts between an initial year, called the index year, and subsequent years. Due to concerns that its SVS rules were "discouraging investment in newly acquired exchanges during the first year of operations,"⁶⁰ the Commission defined, for all transactions occurring after January 10, 2005, the index year expense adjustment as the seller's expense adjustment for the twelve-month period prior to the acquisition.⁶¹ For example, with respect to Sacred Wind's operations, if, in Year 2, Sacred Wind's HCL support is \$100 and Qwest's HCL is zero for the index year, then Sacred Wind could expect to receive \$50 in SVS, or half of the difference between the two years. In other words, without a waiver of Section 54.305 and relying solely on the remedy of SVS, Sacred Wind would receive high-cost loop

⁵⁷ See *id.* at ¶ 10.

⁵⁸ *RTF Report and Order* at ¶ 97.

⁵⁹ See 47 C.F.R. § 54.305(b)-(e). The Commission further modified the safety valve mechanism in January 2005. See *Matter of Federal-State Joint Board on Universal Service, National Telephone Cooperative Association Petition for Reconsideration*, Order and Order on Reconsideration, 20 FCC Rcd 768 (2005) ("*RTF Reconsideration Order*").

⁶⁰ *RTF Reconsideration Order* at ¶ 11.

⁶¹ *Id.* at ¶ 10.